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No. 00-561

Supreme Court, U.S.
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In The

Supreme Court of the United States

JOSE DANIEL RUIZ CORONADO,

Petitioner,

v.

BANKATLANTIC BANCORP, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

There is really only one question in this case: Whether the Annunzio-Wylie Anti-Money Laundering Act (31 U.S.C. § 5318(g)(3)) ("the Annunzio Act") immunizes BankAtlantic from civil liability to Coronado for providing some of his account information to federal law enforcement authorities when none of Coronado's account information was provided to the federal officials except pursuant to grand jury subpoenas issued in the course of a criminal money laundering and bank fraud investigation, of which the bank was not a target.

Coronado attempts to break this single question into two sub-questions by (incorrectly) arguing (1) that grand jury subpoenas do not constitute "any other authority" within the meaning of the Annunzio Act, thus precluding immunity, because the statutory basis of his complaint, i.e., the Electronic Communications Privacy Act (ECPA), does not recognize grand jury subpoenas as a valid basis for producing Coronado's account records to law enforcement officials in this case (thereby ignoring the more recent and more specific pronouncements by Congress in the Annunzio Act as well as express language in the ECPA recognizing the authority of grand jury subpoenas) and (2) that the immunity provisions of the Annunzio Act cannot be given effect unless Coronado himself can examine all of the secret grand jury records (despite the existence of other evidence, and the opportunity he was given to depose the witnesses, proving that Coronado's account records were provided to the government *only* pursuant to valid grand jury subpoenas).

RULE 29.6 STATEMENT

BankAtlantic Bancorp, Inc. is the parent of BankAtlantic, a Federal Savings Bank, the entity in which Coronado had his account. (Coronado sued the wrong entity, i.e., the bank holding company rather than the bank itself, which was brought to the attention of the lower courts.) To the best of our knowledge, the only publicly held company that owns 10% or more of BankAtlantic Bancorp's stock is BFC Financial Corporation, which owns 100% of Class B common stock and about 26% of the Class A common stock.

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STATEMENT OF THE CASE

There are four egregious misstatements in Coronado's statement of the case. First, federal agents did *not* release Coronado's funds "as having no connection with money-laundering." Second, neither BankAtlantic nor the Eleventh Circuit ever "conceded" that Coronado's financial information was protected from disclosure pursuant to a grand jury subpoena by the ECPA. Third, the trial court's decision was not based "solely" on the evidence submitted to it *in camera*. Fourth, the Eleventh Circuit did not hold a provision of the ECPA void by virtue of judicial control over grand jury practice and procedure, ruling instead that Congress itself, in the Annunzio Act, established that acting in compliance with a grand jury subpoena is a sufficient basis to provide banks immunity from civil liability claims of customers for providing account records to federal law enforcement authorities.

In addition, Coronado's statement seriously understates the nature of the events leading up to the disclosures by BankAtlantic pursuant to the grand jury subpoenas. The full history of this case demonstrates the wisdom of Congress when providing banks immunity in the Annunzio Act from civil liability under *"any* law" (including the ECPA) for disclosures made pursuant to *"any* other authority" (such as grand jury subpoenas). A more complete statement of the facts follows.

1. BankAtlantic Acquires MegaBank

In February of 1995, BankAtlantic acquired the operations of MegaBank, a Dade County commercial bank. MegaBank had an international division headed by

Piedad Ortiz. BankAtlantic did not have an international division prior to its acquisition of MegaBank. BankAtlantic employees, therefore, sought to understand how the international division functioned and began to review its operations.

2. BankAtlantic Discovers Suspicious Activities At The Former MegaBank International Division

Shortly after the acquisition of MegaBank, BankAtlantic conducted an audit of the newly acquired facilities, including the international division. It discovered certain banking practices in that division which appeared to be suspicious and strongly suggested the possibility of money laundering activities and bank fraud. For example, BankAtlantic discovered that a private courier service was making regular deliveries to the division of a pouch containing unusually large amounts of checks, money orders, and negotiable instruments in bearer and restrictive endorsement form, along with deposit and transfer instructions, primarily from customers in Cali and Bogota, Colombia, all without any insurance on the contents of the pouch.

The pouches originated at an "office" in Bogota that purportedly provided only courier services for international bank customers, that was located in the back of another business, and that had no identifying signs as a bank. Among the items in the pouches were checks and other instruments from various locations in the United States that were being returned from Colombia for deposit. A great many of the items originated in New York or New Jersey.

The courier pouches were addressed to BankAtlantic, International Division, Attention Ms. Piedad Ortiz. Ms. Ortiz was an officer of MegaBank until the date of the merger of MegaBank into BankAtlantic. Subsequently, upon completion of the merger, she became the Vice President of the International Banking Division that BankAtlantic acquired from MegaBank in the merger. She had oversight of all the approximately 1,100 accounts in the former MegaBank international office. BankAtlantic was particularly concerned about the suspicious activity of Ms. Ortiz and her assistant Lucia Ramirez – Assistant Vice President, International Banking, who was the second ranking official in the International Division – regarding the pouches and the accounts they oversaw.

BankAtlantic discovered that Ms. Ortiz and her assistant were responsible for initiating and maintaining the courier pouch service. The courier service was run by one of Ms. Ortiz's account customers. BankAtlantic also discovered that Ms. Ortiz and her assistant were initiating or approving the opening of numerous accounts that were missing required customer identification documentation as well as allowing purportedly personal accounts to be used as unregistered and unlicensed money exchange facilities in apparent violation of Florida law. In addition, BankAtlantic discovered, among other things, that letters of authorization were not on file to cover a number of large monetary wire transfers, that documentation did not exist to explain multiple endorsements on checks from the pouches being deposited in BankAtlantic accounts, that deposits were made of third party checks not endorsed by the payees and of money orders missing

the names of the payees without any supporting documentation for the deposits, that negotiable instruments in bearer form in excess of $10,000 arriving in the pouches were being accepted without the filing of currency transaction reports, and that there was a large scale movement of funds in the millions of dollars in and out of Colombian based accounts. BankAtlantic determined that the total account balances in the International Division ranged between $18 million and $25 million per month.

3. BankAtlantic Discloses The Suspicious Activity To Federal Authorities

BankAtlantic brought those suspicious activities to the attention of federal law enforcement personnel. In the course of reporting the suspicious activity to the federal authorities, BankAtlantic did not disclose any account documents, records, or data. The bank provided federal agents with only general information regarding its suspicions and the names and account numbers for five accounts directly and immediately connected with the suspicious activities. None of Coronado's account information was included in this disclosure.

Moreover, at no time were the contents of any incoming or outgoing wire transfers ever disclosed to the government while in transmission or while in electronic storage. The government never requested the bank, nor did the bank ever volunteer, to allow interception of any incoming or outgoing wire transfers for any account at the bank, specifically including Coronado's account. Additionally, at all times prior to the seizure of the funds in Coronado's account, BankAtlantic had no ability to

electronically store, and, thus, did not store electronically for any time period, the information regarding either incoming or outgoing wire transfers in any account. Incoming wire transfers simply resulted in a printout of the information on a printer at the bank and never went directly into any form of electronic storage. Information for outgoing wire transfers was first prepared on paper forms and then typed onto computer screens and transmitted. As a matter of undisputed fact, none of the information regarding either the incoming or the outgoing wire transfers was, or even could be, stored electronically by the bank within the meaning of the ECPA.

4. Criminal Investigations By Grand Juries And Arrests By The Federal Government

The first time any account documents, records, or information regarding any of the approximately 1,100 accounts in the international division under the oversight of Ms. Ortiz at BankAtlantic were obtained by the federal government was pursuant to properly issued and served grand jury subpoenas pursuant to a criminal investigation of money laundering and bank fraud. All of the other documents, records, and information subsequently obtained from BankAtlantic by the federal government regarding those accounts were also pursuant to properly issued and served grand jury subpoenas as part of the criminal investigation.

BankAtlantic received the grand jury subpoenas from the Southern District of Florida, the Eastern District of New York, and the District of New Jersey. BankAtlantic was advised from the outset that the government and the

grand juries were investigating a network of individuals and organizations in New York, New Jersey, Florida, and elsewhere that were allegedly laundering money for Colombian drug organizations in violation of criminal laws.

On June 5, 1996, the U.S. Department of Justice, in conjunction with Colombian law enforcement officials, announced the arrests of several individuals arising out of the investigation labeled by the government as "OPERACION BANCARIAS." The arrests included former MegaBank officers, Piedad Ortiz, and her assistant, Lucia Ramirez. The government alleged that the bank officers were committing bank fraud to facilitate the movement of funds by individuals in Colombia. The investigation specifically included the 1,100 foreign accounts at the former MegaBank international office, the majority of which were opened in Colombia. On June 14, 1996, a Federal grand jury indicted Ms. Ortiz and Ms. Ramirez for making false entries in the books and records of BankAtlantic to keep the bank unaware of a currency transfer operation from Colombia.

5. The Activity In Coronado's Account

Coronado opened his account on May 13, 1996, only a short time before the arrest of Piedad Ortiz and others alleged to be involved in a money laundering operation. The account was opened by Ms. Ortiz. The opening deposits in this account, all of which were financial instruments drawn on United States financial institutions, were shipped from Bogota, Colombia, to Miami via the courier service arranged by Piedad Ortiz. The deposit with which the account was opened consisted of four

checks in odd amounts that totaled precisely $5,000. None of those checks have names or addresses printed on them; except for the account number, they are anonymous because the signatures are completely illegible. Two of those checks, drawn on the same account, are in check number sequence.

Subsequent deposits included checks, traveler's checks, and money orders from individuals in New York and New Jersey. The initial account balance of $5,000 was supplemented until it reached just a little under $46,000. At that point, $45,500 was wire transferred to a Swiss bank account. One day later, new deposits began. These new funds were seized before they could be transferred out of the account.

6. Freezing And Seizure Of The Accounts At BankAtlantic Pursuant To Court Orders

On June 5, 1996, in addition to the arrests of Piedad Ortiz, Lucia Ramirez and others, and in addition to the execution of search warrants, federal agents obtained from Judge Edward Davis of the Southern District of Florida a ten day ex-parte temporary restraining order against the 1,100 accounts in the international division at BankAtlantic, which included Coronado's account. On June 11, 1996, Judge Davis entered an order modifying the TRO by releasing the freeze on sums held in certain accounts, which did not include Coronado's account. On June 13, 1996, the district court entered a second order modifying the TRO by extending the operation of the order for ten days against the accounts that were not released.

On June 23, 1996, the district court issued a seizure warrant under Rule 41 of the Federal Rules of Criminal Procedure directing any agent of the Drug Enforcement Administration to serve BankAtlantic with the warrant and to freeze the funds held in certain specified accounts. The seizure warrant directed any authorized senior bank official of BankAtlantic or the bank's duly authorized legal counsel to take all steps necessary to insure that the accounts and the funds contained therein were immediately frozen until further order of the court and to provide the officer serving the warrant with a written statement as to the sums on deposit in the designated accounts. Coronado's account was one of many accounts frozen pursuant to the seizure warrant.

On June 28, 1996, the district court entered a Supplemental Order On Seizure Warrant. The supplemental order directed the DEA to physically seize the funds which had been frozen by the original seizure warrant, with the exception of certain accounts described in the exceptions list attached to the supplemental order. Coronado's account was not on the exceptions list. On or about July 1, 1996, pursuant to the supplemental order, BankAtlantic complied with the order and turned the funds over to the DEA. On or about August 8, 1996, an administrative forfeiture proceeding was commenced against Coronado's account, among others, as required by the supplemental order. At no time were any funds turned over to the Government except pursuant to the seizure warrant and accompanying court orders.

7. Freezing And Seizure Orders From Federal Courts In New York And Puerto Rico

In addition to the seizure warrants issued by the Southern District of Florida, BankAtlantic received verified complaints in rem and warrants for arrests in rem from the United States District Court for the Eastern District of New York and the District of Puerto Rico.

In the Eastern District of New York action, the government alleged that during the time period March 28, 1995, to October 27, 1995, a total of 1,128 postal service money orders in the aggregate amount of $731,910 had been purchased in a structured manner from 146 separate postal service facilities primarily in New York, New Jersey, and Miami. The money orders were then deposited into various financial institutions (including, but not limited to BankAtlantic), to evade the currency reporting requirements of 31 U.S.C. § 5313. BankAtlantic froze a total of $260,499.61, pursuant to the warrant of arrests issued from New York.

In the District of Puerto Rico action, the government sought forfeiture of money deposited in various banks including BankAtlantic during the time period March 24, 1995, to July 19, 1995. The government alleged that between April 1993 and July 1995, approximately $20 million in U.S. currency was delivered to undercover agents of the FBI and then wire-transferred to bank accounts around the world pursuant to instructions given by a Cali drug money laundering group. The government sought forfeiture of the funds transferred to four accounts at BankAtlantic. On or about July 1, 1996, BankAtlantic advised the U.S. Attorney for the District of

Puerto Rico that all funds had already been turned over to the government in Florida.

8. Release Of Coronado's Funds

About six months after its seizure of the funds, the federal government apparently agreed to release approximately 400-600 of the seized accounts. There is no evidence in the record of this case to establish why the federal government decided to release any of the accounts. The assertion in Coronado's brief that the accounts were ultimately released as having nothing to do with money laundering is nothing more than an iteration of the same conclusory allegation contained in his complaint. Coronado admits, however, that in December 1996, the entire sum in his account was returned in full with interest pursuant to an agreement reached with the federal government. That agreement precluded suit against the federal government but neglected to include BankAtlantic.

9. Coronado Files Suit

Coronado filed suit against BankAtlantic as a purported class action on behalf of all the customers whose accounts had been seized by the federal government. He sought unspecified money damages and attorney's fees. The district court initially dismissed Coronado's complaint with prejudice on the ground that the Annunzio Act immunized BankAtlantic from civil liability for its disclosures to federal authorities of suspected criminal

activity, i.e., money laundering and bank fraud. The Eleventh Circuit reversed, acknowledging that the Annunzio Act grants banks broad immunity under at least three safe harbor provisions, but holding that it was premature to dismiss the case based solely upon the factual allegations of Coronado's complaint. *Lopez v. First Union National Bank of Florida*, 129 F.3d 1186 (11th Cir. 1997), *reh'g denied*, 141 F.3d 1191 (11th Cir. 1998).

In light of the opinion of the Eleventh Circuit, BankAtlantic filed a motion for summary judgment and brought before the district court all of the indisputable, material facts establishing that the bank is entitled to the immunity afforded by the Annunzio Act. Most particularly, the bank submitted an affidavit of the Senior Special Agent of the United States Custom Service responsible for the criminal investigation in Miami along with an affidavit of the Senior Executive Vice-President of BankAtlantic responsible for the bank's compliance with the demands of the grand jury. Both individuals unequivocally swore under oath that at no time did BankAtlantic provide federal agents with access to, or in any way disclose, any account documents, records, or financial information for Coronado's account, or any of the approximately 1,100 other accounts alleged in the complaint by Coronado, except in strict compliance with, and within the scope of, valid and properly served grand jury subpoenas issued pursuant to criminal investigations of money laundering and bank fraud. Coronado was given an opportunity to depose both individuals, but chose to depose only the bank's representative, at which time he failed to ask many relevant questions. In addition, the bank submitted *in camera* to the district court copies of

the grand jury subpoenas and the responsive Coronado account records.

The district court entered final summary judgment for BankAtlantic on June 22, 1999, pursuant to the Annunzio Act because absolutely no bank records of Coronado were disclosed except pursuant to valid grand jury subpoenas. The district judge specifically found as indisputable fact (in his memorandum order adopted by the final judgment) that "BankAtlantic made all disclosures of possible violations of money laundering and bank fraud laws pursuant to valid grand jury subpoenas." The Eleventh Circuit affirmed on August 18, 2000, with an opinion that is appended to the petition before this Court.

REASONS FOR DENYING THE WRIT

A. Congress, Not The Eleventh Circuit, Has Declared That Banks Have Immunity From Civil Liability When Producing Account Records Pursuant To Grand Jury Subpoenas.

The Annunzio Act, which Congress enacted *after* the ECPA, provides the bank with full and complete immunity from any liability to Coronado. The text of the relevant section of the Act itself establishes this point:

> A. Any financial institution [and any director, officer, employee, or agent of such institution]
>
> B. that makes
>
> 1. a disclosure of any possible violation of law or regulation, or

2. a disclosure pursuant to this subsection, or

3. *[a disclosure pursuant to] any other authority*

C. shall not be liable to

1. any person

D. under

1. *any law* or regulation *of the United States*, or

2. any constitution, law, or regulation of any State or political subdivision thereof

E. for

1. such disclosure, or

2. any failure to notify

a. the person involved in the transaction, or

b. any other person of such disclosure.

31 U.S.C. § 5318(g)(3) (emphasis added).[1]

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[1] The precise language of this subsection of the Annunzio Act reads:

> Any financial institution that makes a disclosure of any possible violation of law or regulation or a disclosure pursuant to this subsection or any other authority, and any director, officer, employee, or agent of such institution, shall not be liable to any person under any law or regulation of the United

Application of the express provisions of the Annunzio Act to the indisputable facts of this case is straightforward: (A) BankAtlantic (B) which made a disclosure of possible violations of money laundering and bank fraud laws and made all disclosures of account records pursuant to grand jury subpoenas (C) shall not be liable to Coronado or any of the other account holders in the alleged class (D) under the Electronic Communications Privacy Act upon which claims in Coronado's complaint are based (E) for its disclosures or its failure to notify Coronado or any of the other account holders in the purported class of those disclosures. Congress, not the Eleventh Circuit, created this immunity.

The Eleventh Circuit merely found that by virtue of the clear, express, and broad terms of the Annunzio Act, and in light of the objective this portion of the Act is intended to achieve (i.e., to encourage cooperation with money laundering investigations by protecting banks from civil liability where the government has and exercises the legal authority to demand disclosure of financial records), it is highly logical to determine that grand jury subpoenas fall within the meaning of "*any* other authority." The word "any" is very broad in scope and is not ambiguous. Moreover, a grand jury subpoena is not some inferior form of authority. As this Court has stated: "The institution of the grand jury is deeply rooted in Anglo-

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States or any constitution, law, or regulation of any State or political subdivision thereof, for such disclosure or for any failure to notify the person involved in the transaction or any other person of such disclosure.

American history . . . In this country the Founders thought the grand jury so essential to basic liberties that they provided in the Fifth Amendment that federal prosecution for serious crimes can only be instituted by 'a presentment or indictment of a Grand Jury.' " *United States v. Calandra,* 414 U.S. 338, 342-43, 94 S.Ct. 613, 38 L.Ed. 2d 561 (1974).

This Court has elaborated at length on the investigatory power of grand juries by subpoena. *Id.* at 343-45. Grand juries are afforded great autonomy and latitude in their investigations: "It deliberates in secret and may determine alone the course of its inquiry. The grand jury may compel the production of evidence or the testimony of witnesses as it considers appropriate, and its operation generally is unrestrained by the technical procedural and evidentiary rules governing the conduct of criminal trials." *Id.* Grand juries are expected to dig deep: "A grand jury investigation 'is not fully carried out until every available clue has been run down and all witnesses examined in every proper way to find if a crime has been committed.' " *Id.* at 344.

This Court has also made a point having great significance in the present case: Witnesses before grand juries such as BankAtlantic are compelled to cooperate fully. *Id.* at 345. As the Court specifically stated, "a witness may not interfere with the course of the grand jury's inquiry. He 'is not entitled to urge objections of incompetency or irrelevancy, such as a party might raise, for this is no concern of his.' . . . Nor is he entitled 'to challenge the authority of the court or of the grand jury' or 'to set limits to the investigation that the grand jury may conduct.' " *Id.* at 345.

Without doubt, therefore, the grand jury subpoenas served on BankAtlantic must be considered "any other authority" within the meaning of the third safe harbor of the Annunzio Act. To hold otherwise would be to completely ignore the constitutional authority of grand juries as recognized by this Court. Such a holding would also defy common sense. As a result, the bank definitely has full immunity from all of Coronado's claims under the third safe harbor.[2]

Coronado, however, argues that Congress decided to exempt *only* records held in electronic storage for less than 180 days from the reach of grand jury subpoenas, leaving all other forms of bank records – including records in electronic storage for more than 180 days – within their reach. In making this argument, Coronado fails to point to any provision of the ECPA specifically stating that grand jury subpoenas do not apply to electronic communications less than 180 days old. Indeed, *nowhere* in the ECPA is there a provision stating that grand jury subpoenas cannot be used to obtain account information. Instead, Coronado narrowly focuses *solely* on 18 U.S.C. § 2703(a) and (c) of the ECPA. In essence, Coronado argues that this is the only applicable portion

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[2] All four of the federal banking regulators (the Office of the Comptroller of the Currency, the Federal Reserve Board, the Federal Deposit Insurance Corporation, and the Office of Thrift Supervision) have issued a joint, interagency statement observing that the most certain way for banks to completely protect themselves under the Annunzio Act is to either file a Suspicious Activity Report (SAR) *or ask to be served with a grand jury subpoena*. Federal Banking Law Reports, No. 1751 (April 17, 1998) (emphasis added).

of the ECPA regarding disclosure and that since grand jury subpoenas are not mentioned in this particular section, they cannot constitute "legal authority" under the ECPA and, by extension, under Annunzio. He is wrong.

In the first place, another section of the ECPA expressly states that good faith reliance on "a grand jury subpoena" (or "a legislative authorization, or a statutory authorization," which includes, of course, the Annunzio Act) is a "complete defense to any civil or criminal action" for violation of any of the electronic storage provisions of the ECPA. 18 U.S.C. § 2707(e); *see also* 18 U.S.C. § 2520(d) (same defense for interception of electronic communications). This necessarily means that grand jury subpoenas are "legal authority" under the ECPA. It is a fundamental principal of statutory construction that all parts of a statute (such as the ECPA) must be given effect and that all sections of the statute must be construed with reference to each other to produce a consistent and harmonious whole. As such, it is clear that the ECPA treats grand jury subpoenas as "legal authority," at least for purposes of a bank's immunity from civil liability for disclosure. The latter provision (Section 2707) expressly qualifies the former (Section 2703) and expressly provides a defensive role for grand jury subpoenas (and for other statutory enactments such as the Annunzio Act) in the working of the ECPA.

Moreover, it was *after* enactment of the ECPA that Congress passed the Annunzio Act specifically providing immunity from civil liability "under *any* law or regulation of the United States" (clearly including the ECPA) if disclosure is made pursuant to "*any* other authority." 31 U.S.C. § 5318(g)(3) (emphasis added). If there is to be any

statutory "trumping," it is the Annunzio Act over the ECPA and not the other way around. Furthermore, there is nothing in the Annunzio Act, or in any other statute, expressly prohibiting grand jury subpoenas from serving as "any other authority," thus rendering irrelevant Coronado's citation of *Gelbard v. United States*, 408 U.S. 41 (1972). In short, there is no basis in the ECPA or any other statute or federal law to argue, as Coronado does, that a grand jury subpoena is "not legal authority."

In addition to immunity under the Annunzio Act, the ECPA itself – as BankAtlantic explained to the district court in the motion for summary judgment – also expressly provides a "complete defense to any civil or criminal action brought under this chapter or any other law" when the defendant has made the disclosures in good faith reliance on, among other things, a grand jury subpoena. 18 U.S.C. § 2520(d); 18 U.S.C. § 2707(e). This is especially true where banks, as opposed to government agents, invoke the defense. *Organizacion JD LTDA. v. U.S. Department of Justice*, 18 F.3d 91, 94 (2d Cir. 1994), *cert. denied*, 512 U.S. 1207 (1994), *aff'd*, 124 F.3d 354 (2d Cir. 1997); *see Manufacturas International, LTDA v. Manufacturers Hanover Trust Co.*, 792 F. Supp. 180, 184 and 192-93 (E.D.N.Y. 1992), *aff'd*, 47 F.3d 1159 (2d Cir. 1995), *cert. denied*, 515 U.S. 1132 (1995).

To establish this complete defense, BankAtlantic need only demonstrate that it received facially valid grand jury subpoenas and made disclosures within the scope of those subpoenas. *Id.*; Sen. Rep. No. 99-541 (October 17, 1996), *reprinted in* 1986 U.S.C.C.A.N. 3555, 3581. The bank has done this in the present case. By virtue of the express terms of the ECPA, therefore, even if the Annunzio Act

did not exist and even if BankAtlantic had in fact disclosed the contents of electronic communications regarding Coronado's account while in transmission or storage (which it did not because it did not have such equipment at the time), BankAtlantic has nonetheless established as a matter of law its good faith defense sufficient for summary judgment on the ECPA counts of Coronado's complaint. *See* Sen. Rep. No. 99-541 at 3581; *Davis v. Gracey*, 111 F.3d 1472, 1484 (10th Cir. 1997).

In sum, the ECPA did not preclude BankAtlantic from complying with the grand jury subpoenas served upon it to produce Coronado's account records.

B. Summary Judgment Was Properly Entered Upon The Evidence Presented.

The district court did not abuse its discretion by denying Coronado access to the grand jury subpoenas[3] and the collection of documents produced to the grand jury.[4] There are several reasons.

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[3] The multiple grand jury subpoenas demanded several different types of records about the accounts in the international division. The subpoenas sought specific types of information and sought information about certain specific accounts, which, presumably, is at least part of the reason the federal government insists on maintaining the secrecy of these subpoenas.

[4] It should be noted that BankAtlantic produced to Coronado in this case *all* of the documents regarding his account in the possession of the bank. What the bank has not done is to identify for Coronado the subset of those documents produced to him that were also produced to the government pursuant to the grand jury subpoenas.

First, Congress intentionally made secret the information in this particular case involving a criminal money laundering and bank fraud investigation. An express provision of the Annunzio Act prohibits notification to Coronado of the disclosures made by BankAtlantic to the grand jury. 31 U.S.C. § 5318(g)(2) ("A financial institution, and a director, officer, employee, or agent of any financial institution . . . that reports a suspicious transaction pursuant to . . . any other authority [which includes grand jury subpoenas] may not notify any person involved in the transaction that the transaction has been reported."). Moreover, the obstruction of criminal investigations statute makes it a criminal offense for bank officers to disclose the grand jury information involved in this case without authorization. 18 U.S.C. § 1509(b)(2).

Thus, Congress clearly intended the types of grand jury information in this case to remain secret at least during the course of a criminal investigation, which in this case was ongoing when the judge made his decision and which is still ongoing. Moreover, in this case the government specifically required BankAtlantic to maintain secrecy and refused to allow the bank to disclose the materials to Coronado. There is an excellent policy reason for this: If disclosure could be obtained merely by filing a lawsuit, it would be easy for anyone who might be a target of a grand jury investigation to simply file a civil lawsuit against someone and then use the civil discovery rules to completely undermine the confidential investigation of the grand jury.

Second, Coronado did not make a good faith attempt to explore available means for seeking the grand jury information despite a long-standing warning from BankAtlantic that he should do so. In essence, Coronado has waived his right to complain about the discovery ruling of the district court. As counsel for BankAtlantic wrote to counsel for Coronado a year and a half before entry of the summary judgment:

> Everything BankAtlantic produced was subject to subpoenas or warrants. In light of the [first] Eleventh Circuit decision in *Coronado* [also known as the *Lopez* case], it is clear that even the *Coronado* court would thus afford BankAtlantic the safe harbor protection of the Annunzio-Wylie Act. The only problems remaining for BankAtlantic are the hoops it must jump through in order to prove that its production of materials was only in response to subpoenas. In fact, we have no greater access to this material than you do. While we have the subpoenas, we cannot use them without a court order or authorization from the government. You cannot get them without a court order or authorization from the government.
>
> Since you are the plaintiff and bear the burden when signing pleadings to attest to the legitimacy of your complaint, we would suggest that during this period prior to the issuance of any mandate, you attempt to verify what I am telling you from government sources to avoid any further expense in this case.

Despite this information and warning, Coronado did not make any effort to bring the government into this matter

nor did he make any attempt to follow established procedures for seeking disclosure of secret grand jury information. Coronado should have sought, by request, by subpoena, or by some other means, to have involved the government and the district courts supervising the grand juries. *See* Rule 6 (especially subsections (e)(3)(C) and(D)) of the Criminal Rules of Procedure. Even after BankAtlantic served its motion for summary judgment appending the affidavit of the senior United States Customs Service agent in charge of the investigation, David White, Coronado still made no attempt to approach the government or even to depose Agent White about the grand jury information he still purports to seek.

Finally, the district court did not abuse its discretion when denying Coronado access to the grand jury subpoenas and to the collection of documents produced to the grand jury because the court reasonably and properly balanced the need for development of the facts relevant to the summary judgment motions with the need to maintain secrecy of the grand jury investigations. To accomplish this, the court took several steps.

(1) When evaluating the motions for summary judgment, the district court considered the lengthy and publicly-filed affidavits of both Frank Grieco and David White (the two key individuals involved in the investigation on behalf of the bank and the government respectively). Both of these individuals explained in detail the publicly available information about the investigation and swore in no uncertain terms that none of Coronado's account records or information was provided to anyone "except in strict compliance with, and within the scope of, valid and properly served grand jury subpoenas

issued pursuant to criminal investigations of money laundering and bank fraud."

(2) The court allowed Coronado an abundance of time (about 10 months after the bank filed its motion for summary judgment) to depose Frank Grieco and David White on their affidavits (although Coronado never even attempted to depose Agent White) and to conduct other relevant discovery as necessary.

(3) The court considered the deposition testimony of Frank Grieco because Coronado brought it to the court's attention. In his deposition, Mr. Grieco reaffirmed the statements in his affidavit, and he even elaborated on his assertion that none of Coronado's account information was provided to anyone except pursuant to grand jury subpoenas. Mr. Grieco explained in detail the steps actually taken by the bank to comply with the grand jury subpoenas:

> Q. Going back to paragraph nine [of your affidavit], the last line, it says, "In strict compliance. . . . " What steps were taken to comply with the Grand Jury subpoenas?
>
> A. We reviewed the Grand Jury subpoenas. We went through our documents within the bank and made sure that the only items that were provided were solely those items that were requested in the subpoena. Just in a general nature, the way the documents are kept, that required either cutting or blanking out information that would have related to other accounts.
>
> Q. Did you speak with anyone in relation to that compliance activity to give you guidance or instructions as to how to proceed?

A. I had discussions with counsel throughout.

Upon being asked a similar question later in the deposition, Mr. Grieco reiterated the steps taken by the bank:

> Q. How did you physically respond to the subpoena in order to gather the requested records?
>
> A. We got the subpoena. We went to the appropriate people to gather the documents that were requested.
>
> The documents were reviewed to ascertain that they were only information that was requested in the subpoena. Other information was either blanked out or cut out or what have you.
>
> That information for the subpoena was subsequently sent to our counsel, and through our counsel I believe they were also reviewed again and then subsequently sent to the appropriate government representatives.

The only matters to which Mr. Grieco refused to testify pursuant to the grand jury secrecy rules were the actual contents of the grand jury subpoenas and the specific nature of the information provided to the grand jury pursuant to those subpoenas.

(4) In addition, the district court reviewed *in camera* the grand jury subpoenas and the documents provided to the grand jury in response to those subpoenas to verify for itself the accuracy of the affidavits and deposition testimony presented to it. Because of the affidavits, the opportunity to depose, and the ability of the judge to verify with certainty the fundamental fact in this case, there was no "particularized need" for the trial court to

go beyond an *in camera* inspection and require disclosure of the grand jury materials to Coronado.

Coronado argues that the *in camera* inspection was improper. In making this argument, Coronado overlooks, among other things, circuit court case authority approving similar procedures. For example, in *Young v. United States*, 406 F.2d 960, 961 (D.C. Cir. 1969), the D.C. Circuit stated that *in camera* inspection by a trial judge of a witness's grand jury testimony to look for inconsistencies with his trial testimony, which would then be the only portion (if any) of the grand jury information reported to opposing counsel, was an appropriate method to maintain grand jury secrecy and yet satisfy the needs of the ongoing litigation. *See also In re Grand Jury Investigation*, 55 F.3d 350, 355-56 and n.3 (8th Cir. 1995); *In re Grand Jury Proceedings*, 654 F.2d 268 (3d Cir. 1981).

In the present case, the district court took every reasonable step to determine, and gave Coronado every reasonable opportunity to test, the accuracy of the assertions by both the bank's and the government's agents that "at no time did BankAtlantic provide federal agents with access to, or in any way disclose, any account documents, records, or financial information for Coronado's account, or any of the approximately 1,100 other accounts alleged in the complaint by Coronado, except in strict compliance with, and within the scope of, valid and properly served grand jury subpoenas issued pursuant to criminal investigations of money laundering and bank fraud." As such, the Annunzio Act provides BankAtlantic with complete

immunity from Coronado's claims, and summary judgment was properly entered in favor of the bank.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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